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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-625

ROBERT EVERETT HUNTLEY and GIPSON F. HEMPHILL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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No. .....

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Opinion Below.

The opinion of the Court of Appeals is not yet reported. A copy of the opinion is attached in our Appendix (App. A). On October 4, 1976, the United States Court of Appeals for the Fifth Circuit denied petitioners' Petition for Rehearing with Suggestion for Rehearing *En Banc*. A copy of the order denying the Petition for Rehearing is attached in Appendix B.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the failure to secure petitioners' presence at the rendition of the verdict in a non-jury trial vitiates the verdict.

2. Whether full implementation of the Sixth Amendment right to counsel requires federal district judges to secure a wavier of the right to separate counsel from two defendants jointly represented by single counsel.

Statement.

On July 16, 1974, an eighteen count Indictment was filed in the United States District Court for the Northern District of Texas, Wichita Falls Division, charging petitioners Huntley and Hemphill with Conspiracy, Interstate Transportation of Stolen Property Valued in Excess of $5,000, Interstate Transportation of Forged Securities and Making False Statements to Obtain Loans from Banks Insured by the F.D.I.C. in violation of Title 18 U.S.C. §§ 371, 2314 and 1014 [R. 1].[1]

The instant case commenced by jury trial on November 5, 1974. After the conclusion of the direct examination of the government's first witness, petitioners waived their right to a jury trial and agreed that to the extent possible, the matter would be submitted to the court by stipulated testimony [R. 341]. It was fully agreed that petitioners had a right to compel the testimony of any witness for whom a stipulation could not be reached [R. 347-348]. Thereafter, the matter was tried by the court on stipulated facts.

On March 4, 1975, the court entered a verdict judging petitioners guilty on Counts One through Eighteen. Both petitioners were committed to the custody of the Attorney General for a period of five years on Count One, ten years on Counts Two through

[1]"R." is a reference to the Clerk's Record.

Seventeen (to run concurrently with each other as well as the sentence on Count One) and two years on Count Eighteen (to run concurrenly with Counts One through Seventeen) [R. 584-585].

The evidence revealed that petitioners, through the R. E. Huntley Cotton Company, were in the business of buying, selling and warehousing cotton [R. 392]. In conducting that business, petitioners presented checks and drafts drawn on the R. E. Huntley Cotton Company and related entities' bank accounts to various banks, sometimes accompanied by warehouse receipts [R. 373]. These checks and drafts were genuine instruments, signed by R. E. Huntley Cotton Company employees [R. 467-490]. The banks regularly honored the checks and drafts on presentment because they received an exchange fee from the R. E. Huntley Cotton Company and because all R. E. Huntley Cotton Company obligations were regularly paid [R. 373-375, 376, 378-379, 401-402, 405, 451-453, 454-455, 466].

In July, 1973, a government investigation revealed that the warehouse receipts which accompanied drafts were not supported on that date by bales of cotton in the R. E. Huntley Cotton Company warehouses [R. 467-490].

The evidence also reflected that petitioners opened an account on behalf of the Altus Cotton Company in Altus, Oklahoma at the First National Bank of Altus, Oklahoma [R. 454-455]. On the signature card, petitioner Hemphill signed the name "S. B. Marlin" and petitioner Huntley signed the name "R. E. Huntley" [R. 396, 454-455]. Both petitioners signed the name "S. B. Marlin" to various drafts of the Altus Cotton

Company account [R. 396-397]. There was no living person in the Altus area by the name of S. B. Marlin [R. 396].

The R. E. Huntley Cotton Company employed a Shelby Marlin during the period of January, 1970 to July, 1973 [R. 396]. Shelby Marlin never used the name "S. B. Marlin" and never authorized anyone to use the name "S. B. Marlin" [R. 396]. Drafts signed with the name "S. B. Marlin" as Maker, by petitioner Huntley or petitioner Hemphill were signed with the knowledge or consent of the other [R. 396-397].

The evidence also reflected that on June 29, 1973, the R. E. Huntley Cotton Company procured a loan of $1,288,000.00 from the First State Bank of Vernon, Texas, and that warehouse receipts accompanied the note executed on that date [R. 399, 463, 468, 489]. Additionally, less than a month later, on July 16, 1973, the unpaid balance on the June 29 note was $367,168.84 [R. 490]. The collateral agreement provided for the release and free substitution of security pledged on the loan [Government's Ex. 18B]. On July 16, 1973, the F.B.I. found eight bales of cotton corresponding to the 7,095 warehouse receipts which the bank held at that time [R. 489].

ARGUMENT.

I

The Failure of the Court to Have Petitioners Present at the Rendition of the Verdict Vitiates Their Convictions.

The record in the instant case reveals that petitioners knowingly and intelligently waived their constitutional right to a jury trial [R. 341-348]. With equal clarity the record reveals that petitioners did not waive their right to a trial. On the morning following the conclusion of the direct testimony of the first government witness, petitioners' counsel advised the court of "our intention to waive, both orally and in writing, a jury in this case, seeking a submission to the Court and the Court alone—with the further suggestion to the Court that the matter be submitted to the extent possible by stipulated testimony." [R. 341].

The court responded [R. 341-342]:

> You propose that if the Court or if the parties agree to waive a jury, that the testimony be submitted to the Court—the testimony of the witnesses be stipulated to the Court by stipulation to the effect if the witnesses were present in the courtroom and placed under oath they would testify as follows, and then state the testimony of each witness, and in those instances where the parties could not agree as to what a witness would testify to, that that witness may be called in person, placed under oath and testify before the Court without a jury?
>
> [DEFENSE COUNSEL]: Yes, Your Honor, that is my request.

THE COURT: And do you further request that and move that the Court consider any evidence that the Court has heard up to this point, where the jury has been present, in determining the innocence or guilt of the Defendants?

[DEFENSE COUNSEL]: That is correct, Your Honor.

* * *

THE COURT: All right. And you'll work out some stipulation perhaps on any cross-examination you may have had of Mr. Gardner, what may have been developed?

[DEFENSE COUNSEL]: Yes, Your Honor.

The prosecutor pointed out that it was [R. 346]:

the Government's understanding that what the defendants propose to do is submit to the Court for a factual finding . . . general findings as to guilt or innocence, and that they intend to proceed on a legal basis, or they intend to proceed on a matter of law from that point on.

The court thereafter took a waiver of jury trial [R. 347-348]:

THE COURT: Mr. Huntley, have you heard the statements made by your attorney as well as the Court's statements and the statements made by the United States Attorney?

MR. HUNTLEY: Yes, sir.

THE COURT: Are you agreeable to the proposal—

MR. HUNTLEY: Yes, sir.

THE COURT: Made and stated to this Court?

MR. HUNTLEY: Yes, sir.

THE COURT: That the case will be submitted to the Court, you're going to waive a jury trial?

MR. HUNTLEY: Right. Yes, sir.

THE COURT: Now, I've explained, I think to you—you're entitled to a jury trial, we have a jury, we're in the middle of a jury case, but you agree to waive a jury and submit the case to the Court?

MR. HUNTLEY: Yes, sir.

THE COURT: Now, the case will be submitted to the Court on stipulations—that is, the parties will agree as to what witness would testify if brought before the Court and placed under oath; you understand that?

MR. HUNTLEY: Yes, sir.

THE COURT: Now, those witnesses where the testimony could not be stipulated to may be brought and testify in person before the Court.

MR. HUNTLEY: Yes, sir, I understand.

THE COURT: Then, the Court would consider the evidence also of Mr. Gardner who testified here in person—

MR. HUNTLEY: Yes, sir.

THE COURT: —and based on the evidence submitted to the Court and the stipulations, the Court would make a determination of the innocence or guilt of yourself—do you understand that?

* * *

THE COURT: Okay. Mr. Hemphill, if you'll stand.

(Defendant Hemphill stands)

THE COURT: Did you hear my statements to Mr. Huntley?

MR. HEMPHILL: Yes, sir. I did.

THE COURT: And have you heard all these proceedings this morning, the statements made by Mr. Colvin and Mr. Jackson and the Court, and also the United States Attorney?

MR. HEMPHILL: Yes, sir.

THE COURT: Do you agree in all respects to what has been said?

MR. HEMPHILL: Yes, sir, I do.

THE COURT: If I propounded the same questions to you that I propounded to Mr. Huntley, would your answers be the same as Mr. Huntley's?

MR. HEMPHILL: Yes, they would.

THE COURT: All right. And are you agreeable to executing the waiver of a jury?

MR. HEMPHILL: Yes, sir.

The court then recalled the jury and advised them that their services would not be needed. He told them that it would be his duty to decide guilt or innocence, and that he would [R. 356]:

> hear the evidence of the witnesses and make a determination. I'll make the same determination that you would have to make in the case.

Petitioners also urged on appeal that the record revealed that petitioners' joint trial counsel provided ineffective assistance and that such ineffective assistance was characterized by stipulations to totally inadmissible evidence, and to conclusory assertions which were contradictable. Petitioners argued that the record revealed

counsel had failed the required role of advocacy and had not given petitioners the trial to which they were constitutionally entitled. The government responded by contending that petitioners did not offer material either within or *dehors* the record which would suggest that petitioners had not signed the stipulations voluntarily. Because of the government's suggestion that the appellate court could conclude that no evidence extraneous to the record existed to support this position, petitioners responded by affidavits that would not have been tendered at the appellate stage but for the government's suggestion. These affidavits were never contradicted. See *United States v. Hammerman,* 528 F.2d 326, 328, n. 3, (4th Cir., 1975). See also *United States v. Herrera,* 531 F.2d 788 (5th Cir. 1976). These affidavits were provided by appellate counsel, Richard L. Rosenfield and Ney Sheridan, Esq. of Vernon, Texas (who had at one time represented petitioners in related state proceedings). The affidavits revealed that on separate and unrelated occasions each of these lawyers had been advised by petitioners' trial counsel that petitioners had advised him that the proposed stipulations were replete with factual inaccuracies. He informed petitioners that it made no difference because the trial judge would not read them but would rely instead on a factual summary by his law clerk.

The Court of Appeals declined to consider the affidavits and rejected the argument of ineffective assistance of counsel. This, of course, left petitioners to the prospective remedy via 28 U.S.C. § 2255.

The record does affirmatively reveal that petitioners did not waive a trial. Yet, the combination of acts by their trial counsel and the court deprived them of a trial in any meaningful sense. The record clearly

reveals that the court deluded petitioners into believing that they would receive a trial, albeit a compacted one. The final blow to the deprivation of a trial was the court's rendition of the verdict of guilty without seeking to secure petitioners' presence for that solemn moment. It is a matter of sufficient importance to require the attention of this Court.

Rule 43, Federal Rules of Criminal Procedure, provides in pertinent part:

> PRESENCE OF THE DEFENDANT.
>
> The defendant shall be present at every stage of the trial including the impaneling of the jury *and the return of the verdict,* and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. * * * [Emphasis supplied].

In our view, the failure of the court to comply with the strict mandate of Rule 43 is inexcusable. In no manner did petitioners consent to the proceedings going forward without them (See *McKissack v. United States,* 379 F.2d 754, 762 (5th Cir. 1967)), nor was there a knowing waiver of presence. *Wade v. United States,* 411 F.2d 1046 (D.C. Cir. 1971); *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Cross v. United States,* 325 F.2d 629 (D.C. Cir. 1963); *Evans v. United States,* 284 F.2d 393 (6th Cir. 1960); *Schor v. United States,* 418 F.2d 26 (2nd Cir. 1969).

The right embodied in Rule 43 is not a matter of form—it is a matter of substance that goes to

the very core of our system for the administration of criminal justice. As the late Mr. Justice Black stated for the Court in *Illinois v. Allen,* 397 U.S. 337, 338, (1970):

> One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.

Indeed, the Court has reflected upon the right to be present as "a leading principle that pervades the entire law of criminal procedure", *Lewis v. United States,* 146 U.S. 370, 372 (1892), and has commented upon the "peculiar sacredness of this high constitutional right." *Lewis v. United States,* 146 U.S. at 375.[2]

In *Diaz v. United States,* 223 U.S. 442 (1912), the Court defined the right to be present ". . . in broad, often quoted language" (*United States v. Gregorio,* 497 F.2d 1253 (4th Cir. 1974), cert. denied 419 U.S. 1024 (1974)):

> In cases of felony our courts, with substantial accord, have regarded [the defendant's right to be present] as extending to every stage of the trial, inclusive of the impaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. [223 U.S. at 455.]

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[2]*Lewis* quoted with approval from a Virginia case, *Hooker v. Commonwealth,* (13 Grat. 763) (146 U.S. at 373):

> It is the right of anyone when prosecuted on a capital or criminal charge, to be confronted with the accusers and witnesses; and it is within the scope of this right that he be present, not only when the jury is hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected.

Diaz quotes with approval (at p. 456) *Barton v. State,* 67 Ga. 653 (1881) (failure to secure presence of accused felon "at all stages of the trial, especially at the rendition of the verdict" is reversible error).[3]

Rule 43 is "designed primarily to insure the defendant's presence, not to permit the trial to proceed in his absence." *Wade, supra,* (441 F.2d at 1048); *United States v. Moore,* 466 F.2d 547 (3rd Cir. 1972), cert. denied 409 U.S. 1111.

The underpinning of the Rule is manifest. It reflects more than the privilege of confrontation of witnesses for the right to be present specifically includes not only historically, but by virtue of Rule 43's specific language, the right to be present at the impaneling of the jury and the return of the verdict. The *raison d'etre* rests in part on the notion that procedural due process requires not only actual justice but also the appearance of justice. Society has a stake in the outcome. As put in *Hopt v. Utah,* 110 U.S. 574, 579 (1884), "[t]he public has an interest in [the defendant's] life and liberty. Neither can be lawfully taken except in the mode prescribed by law." The right to be present ". . . also rests upon society's interests in due process." *Bustamante v. Eyman,* 456 F.2d 269, 274 (9th Cir. 1972). As the Cout put it in *Hopt, supra* at 579:

> [T]he legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.
>
> For these reasons, we are of opinion that it was error which vitiated the verdict and judgment, to permit the trial of the challenges to take place in the absence of the accused.

[3]See also *Schwab v. Berggren,* 143 U.S. 442, 448 (1892):

> The personal presence of the accused from the beginning to the end of a trial for felony involving life or liberty, *as well as at the time final judgment is rendered against him* may be, and must be assumed to be, vital to the proper conduct of his defense and cannot be dispensed with. [Emphasis added].

United States v. Gregorio, 497 F.2d 1253 (4th Cir. 1974), cert. den. 419 U.S. 1024, is particularly instructive. The *Gregorio* court points out that the right to be present is based in part on the premise that a defendant charged with a felony has a right to be present ". . . in order to prevent the loss of confidence in courts as instruments of justice which secret trials would engender." (497 F.2d at 1258). The *Gregorio* court notes also (at n. 10):

> One of the best expressions of this rationale behind the right of presence is found in Rex v. Badmin Justices [1947] 1 All Eng. 109, a criminal case in which a witness was interrogated by the court in the absence of the defendant. In that case, Lord Goddard said:
>
> That is a matter which cannot possibly be justified. I am not suggesting for one moment that the justices had any sinister or improper motive in acting as they did. It may be that they sent for this officer in the interests of the accused; it may be that the information which the officer gave was in the interests of

the accused. That does not matter. Time and again this court has said that *justice must not only be done but must manifestly be seen to be done.* [Emphasis added].

Similarly, in the instant case, we do not suggest improper motive by the court below. Nevertheless, to the layman, there is necessarily the appearance of impropriety. The appearance of justice is not best served when a defendant first learns of a court's verdict pronouncing his guilt from a radio broadcast or newspaper account rather than in open court as Rule 43 specifically requires.

We do not ignore the fact that certain types of violations of Rule 43 have been held to be harmless error. *United States v. Gradsky,* 434 F.2d 880 (5th Cir. 1970), cert. denied 401 U.S. 925; *Estes v. United States,* 335 F.2d 609, 618 (5th Cir. 1964), cert. denied 379 U.S. 964; *Cf. McKissack v. United States,* 379 F.2d 754 (5th Cir. 1967). Despite the result with certain of Rule 43 violations, it is not consonant with the interests of justice to apply the harmless error doctrine where, as here, a verdict is rendered against defendants who have not voluntarily absented themselves. We believe our reasoning to be compelling —Rule 43 explicitly provides a defendant the absolute right to be present at "the return of the verdict". If the provision of the Rule has any efficacy, it necessarily follows that there must be a manner of enforcing it and thus, a sanction for its violation. If the harmless error doctrine is applicable, there can never be a case where a violation of the provision for presence at the verdict will be vindicated. The general test for whether reversal is required for those types of violations

of Rule 43 to which the harmless error doctrine is applicable is "whether there is any reasonable possibility of prejudice." *Wade v. United States, supra; United States v. Reynolds,* 489 F.2d 4 (6th Cir. 1973), cert. denied, 416 U.S. 988. That test is totally inapposite under these circumstances. The defendant's right to be present at the rendition of the verdict reflects certain constitutional values that cannot qualitatively be measured on scales of prejudice.

The right to be present at verdict surely rests in part on the values underlying the Confrontation Clause —the right to have the trier of fact face the accused eye to eye as guilt is pronounced. It is at this point that the weight of the accusatory process reaches culmination. The right to poll the jurors individually is, of course, directly related to precisely this aspect. There have been instances at this juncture when jurors have changed their minds and not had the strength of purpose to render a guilty verdict as they face the accused. See "Presence of the Defendant at Rendition of the Verdict in Felony Cases," 16 Columbia L.Rev. 18 (1916). Moreover, we see no sound distinction in this respect between jury trials and court trials—where a single person sits as trier of fact. In *Hopt, supra,* at 578, the Court observed that "[t]he requirement is not that [the defendant] must personally be present at the trial by the jury, but 'at the trial' ".

We believe there can be little quarrel with the proposition that no person can callously and totally dispassionately pass such serious judgments on his fellow human beings as inheres in verdicts in criminal cases. All judges must in some measure feel the weight of such judgments as they render their fact finding decision. In *Wade v. United States,* 441 F.2d 1046,

1050 (D.C. Cir. 1971), the Court made an important observation:

> [W]e must keep in mind the importance of a defendant's presence at all stages of his trial. Indeed, this aspect of a trial has constitutional prestige in the Sixth Amendment guarantee of the right to confront adverse witnesses—in good part a constitutional recognition of a psychological influence. Though perhaps to a less degree the same influence pertains to the right of confrontation of defendant and jury.

Wade expressly recognizes—as logic commands—that there is a psychological underpinning to the confrontation between the arbiter of guilt and the accused. This psychological influence has constitutional basis and cannot be ignored. More importantly, it should not be ignored; it is difficult to dispute the proposition that it could subtly affect the outcome of the verdicts in non-jury trials if the courts were armed with the knowledge that they could find guilt, then simply inform the defendant of the outcome via correspondence.

Similarly inapposite is the generally correct statement in *Stein v. United States,* 313 F.2d 518, 522 (9th Cir. 1962), cert. denied 362 U.S. 950, that "[t]he Constitution does not assure the privilege of presence when presence would be useless or the benefit but a shadow such as inconsequential bench conferences or in chambers legal discussions." *Cf. Peterson v. United States,* 411 F.2d 1074 (8th Cir. 1969), cert. denied, 396 U.S. 920; *Cox v. United States,* 309 F.2d 614 (8th Cir. 1962). Here, there is no debate as to whether presence is required; here, presence is specifically guaranteed.

The rendition of the verdict in a criminal case reflects other, albeit subtle, values implicit in our criminal justice system. It becomes perhaps the most solemn moment in any trial. It is the moment that our accusatory process brings its final weight to bear on the individual. As discussed previously, due process is not afforded when the court renders its verdict without even attempting to secure the defendant's presence for this ultimate event.

If due process guarantees a defendant the right to be present ". . . in order to prevent the loss of confidence in courts as instruments of justice which secret trials would engender" (*Gregorio, supra,* (479 F.2d at 1258)), then the demand of due process has not been met here.

We stress that if the harmless error doctrine is applicable, then the explicit right to be present at the rendition of the verdict is a right without meaning. If harmless error is applicable, then we cannot envision any case where the failure to have a defendant present at verdict could be anything but harmless. If one attempts in any case to weigh whether defendant's presence could have changed a guilty verdict rendered in his absence, one would always conclude that the lack of presence could not have had any effect. In this instance, any meaningful evaluation of prejudice would necessarily be evasive.

The right to be present is constitutionally based. *Illinois v. Allen, supra; Snyder v. Commonwealth of Massachusetts,* 291 U.S. 97 (1934); *Jones v. United States,* 299 F.2d 661 (10th Cir. 1962), cert. denied 371 U.S. 864. There exist "some constitutional rights so basic to a fair trial that their infraction can never

be harmless error." *Chapman v. California,* 386 U.S. 18, 23 (1967). Just as the accused's right to be present during the impanelment of the jury is such a right, *United States v. Crutcher,* 405 F.2d 239 (2nd Cir. 1968), cert. denied 394 U.S. 908, so too is the right to be present at the moment of verdict.

II.

The Convictions Should Be Reversed Due to Failure of the District Court to Advise Petitioners of the Potential Conflict of Interest by Their Joint Counsel and to Obtain a Waiver.

In the trial court, petitioners were jointly represented by one attorney. Petitioners strongly urged on appeal that the attorney operated under a potential conflict of interest in his joint representation and that the joint representation prohibited him from pursuing alternative defenses that would have been available if he had not been fettered. Petitioners urged on appeal and on petition for rehearing that the court should impose a requirement that the district court warn jointly represented co-defendants of the danger which potentially inheres in joint representation. The Fifth Circuit declined to impose such a requirement, thus continuing the conflict in circuits that now exists throughout the county. Several circuits impose the proper rule—that a trial judge has a duty to advise joint defendants of their right to separate representation and of the pitfalls of securing joint representation. *Campbell v. United States,* 352 F.2d 359 (D.C. Cir. 1965); *United States v. Foster,* 469 F.2d 1, 4-5 (1st Cir. 1972);

United States ex rel. Hart v. Davenport, 478 F.2d 203, 211 (3rd Cir. 1973); *Government of Virgin Islands v. John,* 447 F.2d 69, 74-75 (3rd Cir. 1971). See also *Austin v. Erickson,* 477 F.2d 620, 626 (8th Cir. 1973).

This court should grant certiorari in order to effectuate a rule of national uniformity. The right to conflict-free counsel is an important constitutional right. If courts are prone in the first instance to rely upon the conscience of the advocate to bring potential conflict to the court's attention, then a significant constitutional right will be diluted, for in every previous case where a conflict has been found to exist via post-conviction attack, it necessarily follows that relying on the conscience of the advocate was constitutionally insufficient.

The proper time to preserve constitutional protection is prior to a violation of constitutional rights, not afterward. It is quite simple and fully consonant with the proper administration of justice to require a trial judge to advise joint defendants of their right to separate representation and of the pitfalls of securing joint representation.

The rule we seek to establish is not only more fully protective of constitutional rights, but will also serve to diminish the number of post-conviction collateral attacks seeking to invalidate previously obtained convictions.

We suggest, moreover, that contrary to the statement of the Fifth Circuit, there was sufficient notice to

the court in the instant case to properly have required further inquiry. The novel procedure adopted by counsel to submit the factual case on affidavits should have prompted further inquiry. This Court made a particularly instructive observation in *Glasser v. United States*, 315 U.S. 60, 71 (1942):

> Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused, Mr. Justice Sutherland said that such duty 'is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departure from that mode of trial or from any of the essential elements thereof, and with caution increasing in degree as the offense dealt with increase in gravity.' Patton v. United States, 281 U.S. 274, 312-313, 50 S.Ct. 253, 263, 74 L.Ed. 854, 70 A.L.R. 263. The trial court should protect the right of an accused to have the assistance of counsel. [Emphasis added]. [315 U.S. at 71].

This case vividly points to the need for the trial court to insure that jointly represented co-defendants are aware of potential conflict of interest by their attorney. It seems uncontrovertible that the procedure adopted by the attorney below is highly unusual. This procedure should have alarmed the court to insure that the defendants recognized that a singular attorney might not best be able to advise them as to their individual best interests on such an important and

sensitive decision. At least, in this unusual circumstance, the court should have made proper inquiry on the record as to their joint representation.

The matter thus raised is an important and recurring one which requires the attention of this Court. The protections of the sacred constitutional right to counsel should not depend on the federal circuit within which a defendant finds himself. From all standpoints of due process, a uniform rule is required.

Conclusion.

For the foregoing reasons, petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

RICHARD L. ROSENFIELD,
Counsel for Petitioners.

APPENDIX A.

United States of America, Plaintiff-Appellee, v. Robert Everett Huntley and Gipson F. Hemphill, Defendants-Appellants. No. 75-1871.

United States Court of Appeals, Fifth Circuit. July 29, 1976.

Defendants were convicted in the United States District Court for the Northern District of Texas at Wichita Falls, Robert M. Hill, J., of interstate transportation of forged or falsely made securities and other similar crimes, and they appealed. The Court of Appeals, Gee, Circuit Judge, held, inter alia, that defendants' convictions were supported by sufficient evidence, that the district court committed harmless error in rendering judgment in defendants' absence, and that any error involved in the trial judge's exposing himself to codefendants' presentence report was harmless.

Affirmed.

Appeal from the United States District Court for the Northern District of Texas.

Before TUTTLE, GODBOLD and GEE, Circuit Judges.

GEE, Circuit Judge:

Appellants were convicted on seven counts of interstate transportation of forged or falsely made securities, nine counts of interstate transportation of securities of the value of $5,000 or more knowing the same to have been stolen, converted or taken by fraud, one count of making false material statements to a

federally insured bank for the purpose of influencing the bank to approve a loan, and one count of conspiracy to commit these substantive offenses. The unusual feature of their trial was that individuals who allegedly excelled in the clever but illegal use of documents were convicted in a proceeding conducted almost entirely by document. Finding no reversible error in this combination of poetic and legal justice, we affirm.

I. *The Facts: A Brief Documentary*

Robert Huntley and Gipson Hemphill were partners in the R. E. Huntley Cotton Company (the Huntley company), which both bought and sold cotton for its own account as a broker and operated warehouses. In the summer of 1970, they opened an account in the name of the Altus Cotton Company at the First National Bank, Altus, Oklahoma. The authorized signatures for this account were R. E. Huntley and S. B. Marlin. Also in the summer of 1970, appellants stopped cancelling their warehouse receipts when the cotton represented by the receipts was shipped out of the warehouses. Rather than being destroyed, the receipts were collected in the Huntley company office in Vernon, Texas. Soon a torrent of documents circulated between the Huntley company account in the First State Bank, Vernon, Texas (the Vernon bank), the Altus Company account in Altus, and three other accounts in Quanah, Texas, Frederick, Oklahoma, and Greenwood, Mississippi. Between January 1971, and the discovery of the scheme in July 1973, over $500,000,000 of deposits were made in these accounts, and over 80% of these deposits were solely attributable to transactions between the five participating accounts. Many of the deposits were made by sight drafts drawn

on one of the participating depositors with the worthless warehouse receipts from the Huntley company office in Vernon attached. These drafts were frequently paid by the deposit of other drafts, drawn on another of the depositors and accompanied by more Huntley company cotton warehouse receipts. Part of the flow of documents consisted of checks drawn on the Altus Cotton Company and signed with the name "S. B. Marlin." Both appellants helped prepare drafts with the worthless warehouse receipts attached and signed "S. B. Marlin" on checks.

After this scheme was exposed and appellants indicted on the 18 counts on which they were convicted, a jury trial commenced. One witness, a bank examiner for the State of Texas, testified to the manner in which he conducted the investigation of the Vernon bank which led to its closing. At this juncture, the appellants waived their right to a jury trial. The district court examined each of them on the record to verify their understanding of this waiver and their agreement to their counsel's proposal to submit the case on stipulated testimony. The trial was briefly reconvened twice thereafter, with appellants present, to monitor progress on the stipulations. At the conclusion of the second of these sessions, both sides rested, having submitted all the remaining evidence through stipulations signed by both appellants, their counsel, and the prosecutor. The court reached its decision in chambers, and appellants did not reappear in open court until their sentencing. On appeal, appellants challenge the sufficiency of the evidence, the procedure of the district court, and the adequacy of their trial counsel's representation.

II. *The Sufficiency of the Evidence: Forged Documents*

Appellants challenge the sufficiency of the evidence supporting each of the 18 counts on which they were convicted. We have reviewed the evidence supporting the convictions on Counts 7, 11, 14, and 16, and finding it sufficient, we affirm those convictions. Since the ten-year sentences on those four counts were concurrent with each other and with the sentences received on the remaining fourteen counts, and envisioning no additional collateral consequences from the convictions on the other counts, we decline to review the remaining counts.[1]

Counts 7, 11, 14, and 16 involve the offense of causing the interstate transportation of forged or falsely made securities in violation of 18 U.S.C. § 2314 (1970). In each of these counts, the forged or falsely made security in question is a check drawn on the Altus Cotton Company account and signed on behalf of the company by "S. B. Marlin." Each of these checks was deposited in the Huntley company account in the Vernon bank. The Huntley company received immediate credit, and this credit was promptly used to pay Huntley company checks which were being held by the Vernon bank.

The convictions on these four counts are proper if the government proved either that these checks were "forged" or that they were "falsely made." *E.g., United States v. Anderson*, 527 F.2d 442 (5th Cir. 1976). Although this circuit has previously remarked that the

[1]We thus pretermit consideration of appellants' claim of a fatal variance between the indictment and the proof on Count 18, and the sufficiency attack on all the other counts.

two statutory terms have different meanings, it has never indicated the outer limits of the term "falsely made." *Stinson v. United States*, 316 F.2d 554 (5th Cir. 1963), the seminal case recognizing that "forged" and "falsely made" have different meanings, merely shows that it is not necessary to prove the technical elements of a forgery to sustain a conviction on an indictment which alleges transportation of a falsely made security. We approach the question of whether the "S. B. Marlin" checks were within the scope of the third paragraph of 18 U.S.C. § 2314 without clear guidelines from binding precedent.

We think it apparent that the purpose of the term "falsely made" was to broaden the statute beyond rigorous concepts of forgery and to prohibit the fraudulent introduction into commerce of falsely made documents regardless of the precise method by which the introducer or his confederates effected their lack of authenticity. *See United States v. Tucker*, 473 F.2d 1290, 1294 (6th Cir.), cert. denied, 412 U.S. 942, 93 S.Ct. 2785, 37 L.Ed.2d 402 (1973). Although this circuit has never faced a case precisely like this one—involving use of a check in a spurious name which was the duly authorized signature for an actually existing bank account—the issue has arisen in three other circuits. Each has held that § 2314 condemns such checks. *See United States v. Seay*, 386 F.Supp. 550 (E.D. Ill. 1974), *aff'd*, 518 F.2d 646 (7th Cir.) (per curiam), *cert. denied*, —— U.S. ——, 96 S.Ct. 421, 46 L.Ed.2d 368, 44 U.S.L.W. 3330 (1975) (check written by fictitious drawer on company account); *United States v. Scott*, 457 F.2d 848 (10th Cir.), *cert. denied*, 409 U.S. 866, 93 S.Ct. 160, 34 L.Ed.2d 114 (1972) (check on company account

drawn in fictitious name); *United States v. Metcalf*, 388 F.2d 440 (4th Cir. 1968) (check on individual account opened in fictitious name). These three circuits apparently employ a broad definition of forgery, so their conclusions that such checks are forged may be untenable in this circuit.[2] We nonetheless find them persuasive on the issue of whether the "S. B. Marlin" checks fall within the broader class of "falsely made" securities whose interstate transportation is forbidden by § 2314. The well-known decreased availability and use of blank check forms has made the establishment of a dummy bank account in a fictitious name an almost essential element of any substantial false document circulation scheme. We therefore conclude that § 2314 is violated by the kind of use of a spurious name with fraudulent intent which this record demonstrates.

There is no dispute that the name "S. B. Marlin" on the checks, whether or not totally fictitious, does not correspond to any actual person involved in these transactions. Moreover, there is no indication that either appellant made regular use of the "S. B. Marlin" name as an alias. The factual background previously discussed furnishes ample evidence, particularly when viewed in the light most favorable to the government as required by *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), that the appellants' intent was fraudulent when they opened

[2]*Hubsch v. United States*, 256 F.2d 820 (5th Cir. 1958), apparently adopts a somewhat narrow definition of forgery. But it discusses only the concept of forgery, and since we do not consider whether the "S. B. Marlin" checks were forged, *Hubsch* is irrelevant here. While the *Hubsch* court could have considered the issue of whether the convictions in the case were proper on the "falsely made" theory, it did not.

the Altus Cotton Company account, when they signed the spurious name on the checks, and when they caused the checks to be transported in interstate commerce.[3] While particular proof of reliance on the signature is not necessary to sustain a conviction on "falsely made" securities,[4] we note that the use of the "S. B. Marlin" signature was obviously material to the success of the fraudulent scheme because it contributed to the appearance that the checks were based on arms-length transactions with an independent business entity.

Finally, appellants argue that the evidence is insufficient because there is no showing that they were not authorized to use the name "S. B. Marlin." They rely on *Parker v. United States*, 297 F.2d 135 (5th Cir. 1961). That case, which dealt with signing the name of another, real person to checks, is completely inapposite. The absence of any "S. B. Marlin" from the scene of appellants' operations eliminates the need to prove lack of authorization as a separate element of the offense.

III. *Rendition of Judgment from the Documentary Evidence: Defendants' Absence*

The district judge did not reconvene court to render his decision in the presence of the appellants, and the government concedes that they may have first

[3]We therefore pretermit consideration of precisely which combination of these times is critical to sustain a conviction. *Compare United States v. Metcalf*, 388 F.2d 440, 443 (4th Cir. 1968) (stressing the intent at the time the bank account was opened) with *United States v. Seay*, 386 F.Supp. 550, 554 (E.D.Ill. 1974), *aff'd*, 518 F.2d 646 (7th Cir.) (per curiam), *cert. denied*, ... U.S. ....., 96 S.Ct. 421, 46 L.Ed.2d 368, 44 U.S.L.W. 3330 (1975) (emphasizing the latter times).

[4]*See Stinson v. United States*, 316 F.2d 554 (5th Cir. 1963).

gained actual knowledge of the decision through the media. The appellants contend that this situation represents a violation of Fed.R.Crim.P. 43(a)[5] and constitutes reversible error. We agree that error occurred, but we hold that it was harmless.

At the outset, we reject the extreme positions assumed by each side. The government's suggestion that the rendition of the decision in a bench trial is not a "stage of the trial" within the meaning of Rule 43(a) is untenable. The appellants were therefore entitled to be present in person, and their absence violated the rule.

Appellants, on the other hand, recognize that Rule 43 must be considered together with Fed.R.Crim.P. 52(a), which provides that harmless error is to be disregarded. *E. g., United States v. Gradsky,* 434 F.2d 880 (5th Cir. 1970), *cert. denied,* 401 U.S. 925, 91 S.Ct. 884, 27 L.Ed.2d 828 (1971). However, they suggest that the right to be present at the rendition of the decision is one of those constitutional rights so basic to a fair trial that its denial can never be treated as harmless error. *See Chapman v. California,* 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, 710 (1967). We assume without deciding that this violation of Rule 43 also represents a violation of appellants' constitutional rights.[6] But we decline

[5]This rule provides:

> The defendant shall be present at the arraignment, at the time of the plea, *at every stage of the trial including* the empaneling of the jury and *the return of the verdict,* and at the imposition of sentence, except as otherwise provided by this rule. (emphasis added)

[6]The scope of a defendant's constitutional right to be present at trial is determined, not by Rule 43, but by whether his presence bears a reasonably substantial relationship to the opportunity to defend. *See United States v. Gradsky,* 434 F.2d 880, 883-84 (5th Cir. 1970), *cert. denied,* 401 U.S. 925, 91 S.Ct. 884, 27 L.Ed.2d 828 (1971), and cases cited therein.

to expand the list of rights denial of which may not be treated as harmless error.

Consonant with our assumption that the appellants' absence represents a denial of constitutional rights, we apply the definition of constitutional harmless error from *Chapman*. We find beyond a reasonable doubt that their absence from the rendition of the decision did not contribute to the court's decision or otherwise affect their substantial rights.[7] Our finding depends on the facts that this was a bench rather than a jury trial and that all the evidence, with the exception of the testimony of one introductory witness, was documentary. We are sensitive to appellants' argument that the presence of defendant at the rendition of the decision enhances the solemnity of the ultimate confrontation between the accused and the finder of fact. This occasion vindicates the judicial system's symbolic interest in maintaining the appearance of justice and its pragmatic interest in giving the finder of fact a final opportunity to change its decision. We find appellants' absence to be harmless beyond a reasonable doubt, but we stress that district courts should take all reason-

[7]The constitutional harmless error standard was applied to a Rule 43 violation in *United States v. Gradsky, id.* We recognize that *Estes v. United States,* 335 F.2d 609, 618 (5th Cir. 1964), employed the slightly different verbalization that a conviction cannot stand when there is "any reasonable possibility of prejudice from the defendant's absence." To the doubtful extent that these verbalizations may represent substantive differences, our use of the standard in *Gradsky* is explicitly dependent on our assumption of a constitutional violation. There is no indication that a constitutional argument was raised in *Estes,* and we do not believe that anything in *Gradsky* or in our opinion here conflicts in any way with the *Estes* standard for reviewing a claim based merely on Rule 43.

able steps to obtain the presence of every defendant at the time a decision is rendered.

IV. *Judicial Exposure to Improper Documents: Co-defendants' Presentence Reports*

Appellants were indicted along with three co-defendants who pled guilty. Following the submission of appellants' case to the district judge, but a month before he reached a decision as to their guilt, he sentenced the co-defendants. During that sentencing hearing, he was exposed to testimony which indicated that these co-defendants became involved in the scheme because they had unusual trust and respect for Huntley and that the one co-defendant who was not an employee of the Huntley company was less involved in the company's business than Hemphill. This testimony was obviously not prejudicial to the appellants. There were also several remarks about the "money tree" operated by Huntley which, while unfortunate, are obviously merely colorful restatements of the allegations in the indictment. The judge was also exposed to factual reports prepared for sentencing the co-defendants and to a letter written on behalf of one of the co-defendants by a state law enforcement official. The reports contained the "official version" of the offense, including references to the appellants, and the letter referred to the fact that unspecified state charges arising from the same transactions were pending against them.

In keeping with the procedure followed in *United States v. Ramirez*, 513 F.2d 72 (5th Cir.), *cert. denied*, 423 U.S. 912, 96 S.Ct. 215, 46 L.Ed.2d 140 (1975), we have reviewed the transcript of the co-defendants' sentencing hearing, their presentence reports, and the letter. We strongly adhere to our observation in *Ramirez*

that a judge should not read material containing references to a given co-defendant prior to the adjudication of that defendant's guilt. *Id.* at 77-78. *Ramirez* places a duty on both the judge and those preparing presentence reports on co-defendants to avoid such contact.

However, we find as we did in *Ramirez,* that any error was harmless. We base our conclusion on the minimal prejudice in the improper references to these appellants. None of the material which the judge considered in sentencing the defendants amplified the appellants' roles in the alleged scheme beyond that abundantly demonstrated by the evidence against them. The sentencing material referred neither to prior crimes committed by the appellants nor to their personal histories. As with the appellants' absence from the rendition of the decision, we disapprove of the district court's procedure but find on the peculiar facts of this case that any error was harmless beyond a reasonable doubt.

V. *Effective Assistance of Counsel: Looking Behind the Documents*

Appellants claim that their joint representation by a single, privately retained trial counsel deprived them of their constitutional right to effective assistance of counsel. Having employed new and separate counsel on appeal, they urge that their trial counsel's performance was inadequate and that he labored under a conflict of interest in that the joint representation prevented him from fully pursuing the possible defenses available to each of them only at the expense of the other.

In challenging their trial counsel's actual performance, both appellants attack his decision to rely entirely

on stipulated testimony and his execution of the stipulations. They object to the inclusion of allegedly inadmissible or inaccurate material in the stipulations and to the occasional use of prejudicial colloquialisms to describe their operations. We agree with appellants that the prosecutor's participation in developing the stipulations demonstrates prosecutorial awareness of the alleged incompetency so that, notwithstanding the retained status of counsel, this aspect of their trial representation should be evaluated under this circuit's formulation of the standard of the sixth amendment. *Cf. Fitzgerald v. Estelle,* 505 F.2d 1334, 1336-37 (5th Cir. 1974) (en banc). This standard requires "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance." *MacKenna v. Ellis,* 280 F.2d 592, 599 (5th Cir.), *cert. denied,* 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1960) (emphasis in original). Based on the record before us, appellants' representation at trial complied with these standards. We decline appellants' invitation to invoke the exceptional remedy of a remand from this direct appeal for an evidentiary hearing; the isolated examples of careless or inappropriate language to which they point do not raise a serious question on this issue. The effort to expand the record to go behind the face of the documents to explore trial counsel's representation is appropriate, if at all, only through a proceeding under 28 U.S.C. § 2255 (1970).[8]

[8]In considering this aspect of appellants' ineffective assistance claim, we have not considered the affidavits from their appellate counsel and their counsel in other proceedings. Nor have we taken judicial notice of or otherwise considered the Receiver's Report in the bankruptcy proceeding involving the Huntley company. We mention these three items only to clarify the scope of our review in the event that any of the material contained in these documents is made a proper part of the record in a subsequent § 2255 proceeding.

At the threshold of the joint representation prong of their ineffective assistance argument, appellants ask us to hold that the trial court has a duty to warn co-defendants with joint representation of the possibility of a conflict of interest and of their right to separate counsel. The rule in this circuit is that such advice is unnecessary where there is neither objection, claim, nor notice to the court of any alleged conflict. *E.g., United States v. Boudreaux,* 502 F.2d 557 (5th Cir. 1974).[9] Contrary to appellants' claim, this rule has been consistently applied in this circuit, and we must follow it.

Appellants acknowledge that joint representation does not inherently deprive a defendant of the effective assistance of counsel. *E. g., Foxworth v. Wainwright,* 516 F.2d 1072, 1076 (5th Cir. 1975). By the same token, the government recognizes that the sixth amendment is violated when an attorney is appointed to represent conflicting interests simultaneously. *Glasser v. United States,* 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680 (1942). An "actual, significant" conflict, as opposed to one which is "irrelevant or merely hypothetical," is required to establish a violation with joint appointed counsel. *Foxworth v. Wainwright,* 516 F.2d at 1077, n. 7. We assume for purposes of discussion, without deciding, that the same test applies where

[9]Although this rule is phrased in terms of notice to the court of an alleged conflict of interest, we note that no government agency, including the prosecutor, had notice of any conflict of interest in this case. The prosecutor's familiarity with the contents of the stipulations, *see* page 10 *supra,* is completely unrelated to the asserted conflict of interest between the two defendants.

defendants voluntarily elect joint representation by retained counsel.[10]

When the alleged conflict is that joint representation of co-defendants restricted counsel in selecting trial defenses and strategies, the requisite "actual, significant" conflict of interest is present "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." *Id.* at 1076.

Appellants allege that a conflict of interest requiring reversal existed because joint representation deprived their trial counsel of the opportunity to exploit possible differences in the degree of their criminal intent. However, they point to no specific evidence which was or might have been introduced to show lack of criminal intent on the part of either of them. Although they correctly note that the record indicates that Huntley was more widely known in the cotton business, there is no record evidence supporting Hemphill's assertion that separate trial counsel could have made a plausible defense that he was relying in good faith on Huntley's

[10]We thus pretermit any consideration of whether some additional showing is required to establish a constitutional violation when an actual conflict exists in joint representation by retained counsel. *Compare Foxworth v. Wainwright,* 516 F.2d 1072, 1076 n. 5 (5th Cir. 1975), with *Alvarez v. Wainwright,* 522 F.2d 100, 105 n. 14 (5th Cir. 1975). Regardless of the current status of its teachings on this particular issue, *Porter v. United States,* 298 F.2d 461 (5th Cir. 1962), is inapposite to our case because it involves the undeniable conflict created when defense counsel has a unrelated but simultaneous attorney-client relationship with a principal prosecution witness.

instructions. And contrary to Hemphill's claim, the record at several points demonstrates his active participation in the general scheme and particularly in the use of the "S. B. Marlin" name. The fact that one co-defendant is in a policy-making position and the other in a ministerial position does not necessarily constitute any conflict in their joint representation. *See United States v. Wayman,* 510 F.2d 1020, 1026 (5th Cir.), *cert. denied,* 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 67 (1975). Since the foreclosure of an alternate strategy or defense does not constitute the requisite "actual, significant" conflict of interest unless the defense is at least plausible, *Foxworth v. Wainwright,* 516 F.2d at 1080, we reject appellants' claim of ineffective assistance of counsel. The record does not show such a conflict.

In the absence of any concrete facts suggesting that there was an "actual, significant" conflict of interest, we also reject appellants' alternative request for a remand for an evidentiary hearing to develop the facts further.[11] As with the first prong of their ineffective assistance argument, such factual development, when

[11]We recognize that appellants' suggestion of a remand to develop whether their counsel fulfilled his duty to disclose the consequences of differing defense postures may involve a somewhat distinct issue from the issue of whether there was actual, impermissible representation of conflicting interests. *See Horowitz v. Henderson,* 514 F.2d 740 (5th Cir. 1975). But the absence of a demonstrable "actual, significant" conflict renders it unnecessary to explore the record's silence about counsel's disclosure. We note that our disposition makes it unnecessary to consider what represents a waiver of the right to effective assistance of counsel in the context of joint representation by retained counsel.

necessary, can best be done in post-conviction proceedings.

VI. *Conclusion*

In summary, the record does not support appellants' claims that they were deprived of the effective assistance of counsel, and we decline to remand for an evidentiary hearing to amplify the relevant facts. The district court erred in rendering a decision in the absence of the appellants and in sentencing co-defendants in such a way that it was exposed to material referring to the appellants prior to the adjudication of their guilt, but these errors were harmless beyond a reasonable doubt. The evidence being sufficient to support the convictions on four counts of interstate transportation of falsely made securities, these convictions are

AFFIRMED.

APPENDIX B.

United States Court of Appeals, Fifth Circuit, Office of the Clerk.

Edward W. Wadsworth, Clerk.

October 4, 1976.

TO ALL COUNSEL OF RECORD

No. 75-1871—USA v. Robert Everett Huntley and Gipson F. Hemphill

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(....) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition (....) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
By /s/ Susan M. Gravors
Deputy Clerk

/smg

cc: Mr. Richard L. Rosenfield
Mr. Alan J. Weil
Mr. Michael P. Carnes
Ms. Judith A. Shepherd